Supreme Court of the United States

OCTOBER TERM, 1921.

No. 237.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Petitioner,*

vs.

DAVID FRUCHTER, AN INFANT, BY JENNIE FRUCHTER, *His Guardian ad Litem.*

No. 238.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Petitioner,*

vs.

SAM FRUCHTER.

PETITIONER'S BRIEF.

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PETITIONER'S BRIEF.

I.

ABSTRACT.

The above named suits were brought to this Court on writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit, dated April 16th, 1921 (Transcript of Record, fols. 474, 475, 480, 481).

The suits were commenced in the Supreme Court of the State and County of New York (Transcript of Record, fols. 1, 64), and removed to the United States District Court, Southern District of New York.

The infant's action was brought to recover for personal injuries sustained from contact with defendant's electric wire, maintained, pursuant to standard practice, on its own pole or strut attached to the top of the superstructure of a highway bridge in the City of New York, carrying 149th Street over defendant's right of way. The wire was over 30 feet above the roadway. The infant reached it by climbing up the trellis work of the City bridge to the top girder, and from there ascended defendant's strut, which carried various wires of the defendant used in operating the Harlem River Branch of its railroad running beneath said bridge into New York City. The system was operated by 11,000 volts alternating current. The wires were bare.

The father's action was brought to recover for loss of earnings and medical expenses. The accident occurred June 9th, 1916. The infant was eight years old at the time.

The plaintiff charged the defendant with negligence in maintaining the trellis work of the bridge superstructure so that it resembled a ladder and was attractive to children, in having its bare wires within reach of children from the top of the trellis, and in failing to provide guards or barriers to prevent children from climbing said trellis and coming in contact with the wires.

The cases were tried together before Honorable William B. Sheppard, District Judge, and a jury, in August, 1920. The infant testified that on the day of the accident he climbed the bridge superstructure to reach a bird's nest located at its top. From there, he climbed defendant's strut to seize a pigeon which was perched on one of its wires, shown to be 6 feet 6 inches above the top girder

of the bridge, and 19 inches away from the upright of the strut. The cases were tried on the attractive nuisance doctrine. At the close of the plaintiff's case, defendant moved to dismiss, and at the close of the entire case it moved for a directed verdict on the ground (1) that the Federal court was bound by the New York rule which had rejected that doctrine, and (2) that if the court was bound by the Federal rule, the doctrine did not apply under the conditions shown, especially since the New York Railroad Law prescribed defendant's duty toward the bridge as one of maintenance of its superstructure as such. These motions were denied, exceptions noted and verdicts found for the plaintiff for $10,000, and for Sam Fruchter for $1,000.

Appeals were taken from judgments entered thereon, to the Circuit Court of Appeals for the Second Circuit, and the same were affirmed (N. Y., N. H. & H. R. R. Co. vs. Fruchter, 279 Fed. 419).

QUESTIONS.

(1) Is the attractive nuisance doctrine applicable to this situation: The bridge in question was built in 1908 to carry 149th Street over the Harlem River Branch of the defendant's railroad, which was the main line into Pennsylvania station. It was of standard, modern, steel construction, sustained by its superstructure, comprised of batter posts, beams, chords, uprights, etc. It was 230 feet long, 54 feet wide, 27 feet high, and from the roadway to the top of the bridge was 23 feet. The batter posts formed an angle with the surface of the bridge of fifty degrees and were 28 feet long. The horizontal top girders or

chords were 24 inches high and 27 inches wide. The edges of the steel uprights were connected with a series of steel cross pieces forming a trellis work from the roadway of the bridge to the bottom of the top girder, the object of which was to stiffen the supports and aid in carrying the load. The railroad underneath was electrified in 1912, employing a 11,000 volt alternating current. The wires were carried over the top of and at right angles to the bridge by means of vertical poles or struts. There were four, two at each end of the bridge, attached to the outside longitudinal top girders. On each strut were two cross arms running parallel with the bridge and at right angles to the tracks, the bottom one being 6 feet 6 inches above the top surface of the top girder. The wires were attached to these by porcelain insulators. Those nearest the upright were 19½ inches from it. At the north end, where the accident occurred, there were four wires on the bottom arm and three on the upper. It was conceded that they were beyond plaintiff's reach while on the bridge itself. They were live wires used for propulsion, lighting and patrolling, and were bare. When the branch was electrified in 1912 defendant installed eight signs on the bridge reading:

"LIVE WIRES
DANGER
KEEP OFF."

Four were on the railing at the side of the foot path, facing the same at each end of the bridge. Four were attached to the bottom of the four struts immediately above the top girder of the bridge, facing the respective approaches. Boys of the neighborhood habitually climbed

and played on the bridge superstructure. Only two boys testified they had ever climbed defendant's structures. Defendant had no notice of this, but did know of the use of the City's property, had assigned men for months at a time to chase the boys off, and had on several occasions taken smaller boys home to their parents. The plaintiff did not claim that he was attracted by the bridge trellis or defendant's property, but said that he climbed the former to get a bird's nest, and the latter to apprehend the pigeon, which flew away as his hand touched the wire.

(2) Can negligence be predicated in whole or in part upon the failure of the defendant to guard against the alleged playground use of the superstructure of the City's bridge, since the Railroad Law of New York State requires it to maintain and repair it?

(3) Were the courts below bound, in comity at least, to follow the decisions of the highest court of New York State, which had so steadfastly rejected the doctrine, that the proprietor's non-liability to an infant trespasser had become a fixed rule of property and action, to disturb which would be wrong? As a corollary to this—how is the conflict between the Second and Third Circuit Courts of Appeal to be finally decided?

These questions were raised by the motion for a directed verdict (fols. 434, 435, 436, 438, 441) and also the motion to dismiss, made at the close of the plaintiff's case (fols. 302, 305, 307, 308, 309, 310). See also fol. 426, where the court took judicial notice of Section 93 of the New York Railroad Law.

II.

SPECIFICATION OF ERRORS.

(The numbers correspond to those of the assignments in the transcript of record).

First. The learned Court erred in denying defendant's motion for a non-suit made at the close of plaintiff's case and for a directed verdict in its favor made at the close of the entire case, for the following reasons:

(1) The action was commenced and the trial was had on the so-called attractive nuisance theory on account of an accident occurring within the State of New York, and the learned Court failed to follow and apply the law of said State in respect thereto, as declared by the Court of Appeals of said State, and subsequently confirmed and followed by a long line of State decisions.

(2) The plaintiff was a trespasser, and defendant owed him no duty except to refrain from wilful and wanton negligence, of which there was no evidence.

(3) Even under the attractive nuisance theory of negligence, or any other, the plaintiff failed to prove the cause of action alleged, for the following reasons:

(a) The plaintiff testified, without contradiction, that he was not invited, lured or enticed to his injury by the defendant, but that he deliberately and wilfully climbed up to the scene of the accident knowing that he had no right there and that he was doing wrong.

(b) There was nothing attractive or alluring about the bridge in question or the defendant's wire or strut which supported it, and the plaintiff testified, without contradiction, that neither they nor any of them attracted, enticed or lured him to his injury.

(c) Plaintiff was attracted and lured to the top of the bridge by a bird's nest and to the wire in question, attached to the strut located on top of the bridge, by a bird, over neither of which the defendant had any control.

(d) Neither the top of the bridge nor the wire in question was accessible, as defined in the attractive nuisance doctrine, nor was the plaintiff licensed to be there, expressly or impliedly.

(e) Defendant was not obliged to anticipate and provide for the contingency of the plaintiff or other children climbing to the top of this bridge belonging to the City of New York, and from there to the defendant's wire suspended approximately seven feet above it, the only access to which was via a standard steel strut, attached to the top of said bridge.

(f) Defendant was not required under Section 93 of the Railroad Law, or otherwise, to maintain guards, material or human, so as to prevent the plaintiff or other children from climbing to the top of this bridge belonging to the City of New York.

(g) Defendant was not required to maintain guards, material or human so as to prevent, or to post warning signs so as to warn, plaintiff or other children from climbing up this strut and coming in contact with the wire in question.

(h) Defendant was not negligent in failing to install the device described by the plaintiff's engineer, for it was both inconvenient and impracticable.

(i) In maintaining the wire in question bare and uninsulated, except as against its supporting strut, under these circumstances defendant complied with the standards of practice prevailing under like conditions, and there was no proof to the contrary.

(j) The acts and omissions charged against the defendant were not the sole proximate cause of the accident.

(k) There was no evidence of negligence in defendant's construction of the bridge.

(l) In maintaining warning signs on the bridge and the struts and in assigning men to chase boys off the bridge, defendant more than fulfilled its obligation to the plaintiff and other children (fols. 103 to 106).

III.

ARGUMENT.

These cases were tried on the attractive nuisance doctrine. They do not involve the duty due from the owner of a dangerous instrument, carelessly maintained on the premises of another, to a licensee or even trespasser injured thereon. There the duty is inherent and as between the claimant and respondent the latter has no immunity on account of his ownership or of the unlawfulness of the former's presence. As the duty exists the liability depends on the circumstances without resort to the attractive nuisance doctrine (Temple vs. McComb City Elec. Co., 42 So. 874). This principle is recognized in jurisdictions which reject that doctrine (Nelson, Admr. vs. Branford Water Co., 75 Conn. 548, Braun vs. Buffalo Elec. Co., 200 N. Y. 484, Constantino vs. Watson Contracting Co., 219 N. Y. 443, McCrea vs. Beverly Elec. Co., 104 N. E. 365, Chickering vs. Lincoln Co., 108 Atl. 460, Wittleder vs. Citizens Elec. Co., 47 N. Y. App. Div. 410). Daltry, et al vs. Media Elec. Co., 57 Atl. 833, Fort Wayne Co. vs. Stark,

127 N. E. 460, and Consolidated Elec. Co. vs. Healy, 65 Kan. 798, 70 Pac. 884, fall squarely within this principle, although in the last case especially the court sought to reconcile it with the doctrine. In relying substantially on that case the court below was inadvertently misled (N. Y., N. H. & H. R. R. Co. vs. Fruchter, supra, p. 422).

The instant suits do not fall within the class of cases recognizing liability for dangerous conditions or instrumentalities maintained or left in a public place or adjacent thereto (Snare & Triest vs. Friedman, 169 Fed. 1, Barr vs. Green, 210 N. Y., 252, Jennings vs. Van Schaick, 108 N. Y. 530, Lynch vs. Nurdin, 1 Q. B. 29, 1 Ad. & El. (N. S.) 29, Birge vs. Gardner, 19 Conn. 506, Pierce vs. United Gas Co., 118 Pac. 700); nor within the hidden dangers in private premises, constituting a trap set negligently or intentionally (Phipps vs. Oregon R. R., 161 Fed. 376, Reilly vs. Lissner, 160 Mass. 330, Bird vs. Holbrook, 4 Bing. 628, Townsend vs. Wathan, 9 East 277, 299); nor within the obligation of an owner of premises toward an invitee (Bennett vs. Louisville R. R., 102 U. S. 577, Ansonia vs. Sullivan, 239 Fed. 296). The instant cases raise the question whether defendant had any affirmative obligation to an infant trespasser of tender years, injured by the inherently dangerous instrumentalities, lawfully maintained on its premises, pursuant to standard practice.

There was no conflict of testimony except as to the date of the installation of the four signs on defendant's structures, whether the infant could read the signs, and whether defendant's structures (which complied with standard practice) were safe. Defendant's evidence was so "clearly preponderant" that the entire question is one of law (So. Pac. Co. vs. Poole, 160 U. S. 438, 440).

POINT I.

THE ATTRACTIVE NUISANCE DOCTRINE WAS NOT APPLICABLE, FOR DEFENDANT OWED THE PLAINTIFF NO ACTIVE OR AFFIRMATIVE DUTY. (1) DEFENDANT'S DUTY TO THE PUBLIC IN RELATION TO THE BRIDGE WAS CONFINED BY STATUTE TO MAINTENANCE OF THE BRIDGE SUPERSTRUCTURE AS SUCH, AND NO NEGLIGENCE IN WHOLE OR IN PART COULD BE PREDICATED ON ITS ATTRACTIVENESS TO CHILDREN, (2) THERE WAS NO EXCUSE NOR JUSTIFICATION FOR PLAINTIFF'S TRESPASS ON DEFENDANT'S PROPERTY SINCE (a) IT WAS NOT ATTRACTIVE OR ALLURING TO HIM; THE BIRD ATTRACTED HIM; THE PROPERTY WAS A MERE INCIDENT; (b) THE RELATIVE INACCESSIBILITY OF THE PROPERTY AND THE OBVIOUS DANGER INVOLVED IN SCALING THE INTERVENING BRIDGE SUPERSTRUCTURE WAS NOTICE TO ALL, HAVING THE PHYSICAL CAPACITY TO REACH IT, OF DEFENDANT'S INTENT TO USE AND OCCUPY IT EXCLUSIVELY; (c) THE ATTITUDE OF BOTH THE CITY AND THE DEFENDANT WAS FORCIBLY RESISTANT TO THE PUBLIC USE OF THE RESPECTIVE PROPERTIES AS A PLAY OR HUNTING GROUND; (d) DEFENDANT HAD NO NOTICE OF ANY USE OF ITS PROPERTY BY BOYS. FURTHERMORE, THERE WAS NO PROOF THAT EITHER INSULATION OR THE EVIDENTIAL PROTECTIVE DEVICES WOULD NOT SERIOUSLY INTERFERE WITH THE WIRES' FUNCTIONS IN INTERSTATE COMMERCE.

(1) In playing on the bridge superstructure most of the boys climbed via the trellis (fol. 272). Apparently the plaintiff did likewise (fol. 267).

The alleged attractiveness of the trellis and the duty of the defendant to guard it, were essential parts of the cause of action. Section 93 of the Railroad Law of the State of New York, however, provided:

> "Where a highway crosses a railroad by an overhead bridge, the framework of the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the roadway thereover and the approaches thereto shall be maintained and kept in repair by the municipality having jurisdiction over and in which the same are situated."

The Court took judicial notice of it (fol. 426). The statute obviously defines the whole duty of the railroad company to this bridge superstructure as one of maintenance of it as such superstructure. It has been so construed (City of Yonkers vs. New York Central R. R., 165 N. Y. 142; In re. New York Central, 168 App. Div. 6, Aff'd., 216 N. Y. 722; Town of Cortland vs. New York Central, 175 App. Div. 194, Aff'd., 220 N. Y. 598; Murphy vs. D. & H. Co., 151 App. Div. 351). While those cases do not involve the attractive nuisance doctrine, they construe the statutory duty as one of repair and maintenance and the "purpose of the statute was to insure greater safety at such highway crossings" (City of Yonkers vs. New York Central R. R., supra, p. 145). Having thus defined the purpose of the act and the duty of the railroad in respect to *public* property, the mere circumstance of its attraction cannot enlarge the duty.

(2) (a) The absence of any attraction to the plaintiff, arising from defendant's structure or apparatus is fatal. His pleadings do not allege it, but that the bridge trellis work was the attraction because of its resemblance to a ladder and its proximity to the roadway (fol. 66, 67). Plaintiff impliedly denies that he was attracted by either and asserts that the attraction was the bird's nest, in the bridge superstructure, and the bird, which happened to be perched on defendant's wire affixed to the pole, attached to the top of the bridge (fols. 266, 267). Assuming, for the argument, that the attraction of the bird's nest would not be fatal to the claim that the bridge was attractive within the doctrine, does a similar conclusion follow from the casual and transitory visit of a bird to defendant's wire?

In both the Stout and McDonald cases the attraction was inherent in defendant's premises, the turntable and the coal-mining process, respectively. In Erie R. R. Co. vs. Hilt, 247 U. S. 97, this court held that the argument that the premises attracted the infant had no foundation since he was moved "by the wish to recover his marble." The court below misunderstood that case, although it correctly applied it two years before (National Metal Co. vs. Agostini, 258 Fed. 109).

In the federal courts there has been no departure from this principle prior to the instant cases (Reidel vs. West Jersey R. R., 177 Fed. 374, at p. 378; New York Central R. Co. vs. Price, 159 Fed. 330, at 331, 336).

The great weight of the authority in the state courts recognize it. In Graves vs. Washington Water Power Co., 87 Pac. 956, the infant attracted, as the complaint alleged,

by the nesting birds in the supporting structure of a highway bridge, climbed the lattice work thereof and came in contact with the defendant's electric wires attached to the steel support. The court there said:

> "The things that constituted the attraction which it is claimed drew him to this place were features connected with the river, the bridge and the pigeons, and were matters for the existence of which appellant was not responsible."

In Dickinson McAllister vs. Henrich Jung, 112 Ill. App. 138, a boy climbed defendant's elevated structure, on which its elevated trains were operated by a bare third rail, in the City of Chicago, in quest of a ball, which he believed was on the top thereof. The court said:

> "He went up to look for a ball which he had been told was there. It was not his own, if, indeed, it was there at all. This supposed ball, with perhaps the implied challenge to dare a dangerous venture to obtain it, was the sole attraction * * * He went for his own pleasure, in the hope of acquiring a ball. If the ball was there at all, of which there is no proof, it was not put there by, nor in consequence of any act or omission of the appellant. Nor does it appear that appellant had the slightest reason to suppose the ball would be there in that locality" (p. 145).

Please see Fusselman vs. Yellowstone Valley Land & Irrigation Co., 163 Pac. 473, p. 476, 1st column; Blough vs. Chic. Gr. W. R. Co., 179 N. W. 840; Papich vs. Chic. M. & St. P. Ry. Co., 167 N. W. 686 at 689, 1st column; McDermott vs. Burke, 256 Ill. 401, 406, 407; Kalman vs. Cohen, 203 Ill. App. 597; Colby vs. Chic. Jct. Ry. Co., 216 Ill. App. 315; Meyer vs. Union Light, Heat & Power Co., 151 S. W. 941 at 942, 2nd column; even the turntable must actually attract, Hendricks vs. Kans. So. Ry., 77 So. 130; Taylor vs.

Minneapolis & St. L. R. Co., 163 N. W. 405 at 406; Fincher vs. Chic. R. I. & P. Ry. Co., 78 So. 433; Compton et al. vs. Mo. Pac. Ry. Co., 126 S. W. 821 at 822, 2nd column, and 823; Johnston vs. New Omaha Thompson Houston Elec. Lt. Co., 110 N. W. 711 at 712, 2nd column; Nichol vs. Bell Tel. Co., 109 Atl. 649 at 651, 2nd column; Louisville R. R. Co. vs. Ray, 134 S. W. 858 at 862, 1st column; Texas Ry. Co. vs. Garcia, 216 S. W. 1108 at 1109, 2nd column; Simonton vs. Citizens Elec. Light & Power, et al., 67 S. W. 530 at 531, 2nd column, and 532, 1st column.

(2) (b) In both the Stout and McDonald cases the property of the defendant was on the ground and easily accessible from the adjoining highway or other property, such as the depot to which the public was invited. Here the very nature of the bridge superstructure, and the obvious danger of scaling it, were notice that both the bridge proper and the defendant's property were not intended as a playground. Repeated demonstrations of the possibility of children climbing there could not affect it. Presumably the wires had to be placed within human reach. The difficulty of mounting the top girder, which was 24 inches high and 27 inches wide, from the top of the trellis underneath, is intimated in the testimony of one of the boys (fol. 227). The trial court recognized this feature momentarily (fol. 282).

In Hardy vs. Mo. Pac., 266 Fed. 860, the deceased boy was fatally injured from contact with steam in defendant's conduit, which was 700 feet long, one opening of which was on its property and the other under a street. Into this conduit the defendant discharged steam from its power house boilers. Children played at and in the ends

of the conduit, and three had passed clear through. Holding that no recovery could be had under this doctrine, the court said:

> "We are not here concerned with that class of cases dealing with dangerous agencies or conditions adjoining or near public ways or other private grounds, but with such as are well within private property (p. 861) * * * The danger here consisted of hot water and steam * * * The radius of the danger was obviously limited in area and its duration temporary. It was limited to a place in the conduit several hundred feet from either opening and far from the opening through which this boy entered" (p. 863).

Please see Heller vs. The N. Y., N. H. & H. R. R. Co., 265 Fed. 192 at 199; Sheffield Co. vs. Morton, 49 So. 772 at pp. 775, 776; McAllister vs. Jung, supra, pp. 143, 146; Hageage vs. District of Columbia, 42 App. D. C. 109; McDermott vs. Burke, supra; Colby vs. Chic. Jct. Ry. Co., supra; Fincher vs. Chic. Ry. Co., supra; Mayfield vs. Webb, 111 S. W. 712, 713, 1st column; Coon vs. Kentucky R. R., 173 S. W. 325; Heva vs. Seattle School District No. 1, 188 Pac. 776; Troglia vs. Butte Co., 270 Fed. 75; Polk vs. Laurel Hill, 174 Pac. 414.

In Smalley vs. Rio Grande Western Ry. Co., 98 Pac. 311, holding that the doctrine was not applicable to a railroad yard, the court said:

> "The instrument or agency must not only be dangerous and attractive, but the circumstances of leaving and maintaining it must also be such as to induce young children to believe that they are at liberty to enter and handle or play about it. That is, it must be made to appear, either from the character of the instrument or agency itself, or from the manner and circumstances under which it is maintained or left about the premises, or from other conduct on the part of the

owner or occupant of the premises, that an inducement or its equivalent was held out to young children to enter" (p. 319).

The evidence here shows clearly that the boys, including the plaintiff, knew they had no right on this bridge (fol. 245). In climbing it they evaded the police of both the City and the Railroad. In surmounting the obvious dangers and difficulties of the ascent, the plaintiff's achievement was astounding. The boys knew the wires were there (fols. 229, 233, 240). The plaintiff said he saw and read the signs before the accident (fols. 276 to 280). The redirect examination speaks for itself (fol. 298). The trial court remarked that if the plaintiff had been of such an age as to appreciate the signs he would have been a trespasser (fol. 381). Plaintiff lived in a tenement district of the City of New York, and had been in school for a year and a half (fol. 276).

(2) (c) There were eight signs on the bridge, presumably with the consent of the City, "Live Wires, Danger, Keep Off." The City police officer testified that he could not get near enough to the boys to chase them off (fol. 166). Defendant's witnesses had repeatedly chased the boys off, and men had been assigned for that purpose for months at a time (fols. 361, 369). In the Stout case there was not a scintilla of evidence that the defendant was opposed to the children using its premises, and in the McDonald case "it permitted" it (p. 279).

(2) (d) Only two of the plaintiff's boy-witnesses said they had ever been on defendant's structure. In fact, neither the Court nor plaintiff's counsel made inquiry of

any witness, except the infant plaintiff, as to the boys visiting defendant's property as distinguished from the bridge—although at the opening of the trial, and subsequently, defendant referred to, and distinguished between, the two (fols. 136, 139, 430). The City policeman had never seen any boys there:

> "Q. I am asking you, had you ever seen the boys after they had got up on top of the bridge, climb the superstructure which holds the wires?
> "A. No, I have not seen them up on that" (fol. 168).

This bridge was a part of the post which he patrolled (fol. 150), and for two years prior to the accident he had frequently seen children playing on the bridge (fol. 155). Vogel testified on direct examination that he had been on the bridge ten or fifteen times (fol. 226). On cross examination:

> "Q. When you got up on top of the girders did you climb up into the superstructure that held the wires above the top of the bridge?
> "A. No, sir.
> "Q. You knew the wires were there?
> "A. I knew the wires were there" (fol. 229).

Posner said on direct examination that he had seen lots of boys of different sizes climbing, and playing around the bridge (fol. 230), and on cross examination:

> "Q. If I understand you correctly, you say you never did climb those poles where the wires were?
> "A. I never did climb those poles" (fol. 232).

His previous statement that he climbed up "just underneath the wires" refers to the wires running longitudinally

and at the side of the bridge structure, which were attached thereto by a cross beam:

> "A. There is one beam that the wires are suspended on, and that beam I never climbed up there. * * * But you hold it when you climb up.
> "Q. I can not hear you.
> "A. I climbed up here to the top where it is level (indicating).
> "Q. You went up to the top of the girder?
> "A. Yes, sir.
> "Q. Of the bridge proper?
> "A. Yes, sir" (fol. 232).

The ownership of the wires, here referred to, was not shown, but there is abundant evidence that the power house of the New York Central Railroad was southeast of the bridge (fols. 385, 386, 387).

Neidenburg said on direct examination that he had climbed the bridge about three feet during the year and a half prior to the accident and had seen boys climb many times (fol. 234). Glazer testified on direct examination that he climbed the bridge for two or three years before the accident (fols. 239, 240), and on cross:

> "Q. I am asking you about that part of the steel structure that was above the top of the bridge, did you ever climb up into that?
> "A. No, sir.
> "Q. You knew the wires were there?
> "A. Yes, sir" (fol. 240).

Atrazzo testified that from the top of the bridge he had climbed the superstructure where the wires were about five times (fol. 188). Wohl said that once in a while, when being chased in a game of tag he climbed up the super-

structure above the top of the bridge two or three feet (fol. 223). Referring to the wires, he said: "I did not know whether they were covered or not, so I never went near them" (fol. 223).

The following words are pertinent: "Nothing approaching knowledge by defendant of any passage through the conduit of boys at any time was shown, and such knowledge can not be inferred nor imputed from the three trips in the course of four years shown in the evidence. Such knowledge cannot be founded upon the circumstance that children played about the openings of the conduit. There is no limit, except physical ability, to what a child may do. The law does not require the property owner to guard against any such wide possiblity of action. 'Anticipation,' in the meaning of this doctrine, means probability, not possibility. There must be a reasonable expectation of the presence of children at the time and place of danger before there arises a duty to guard them from that danger. In our judgment, the proof here falls short of this standard" (Hardy vs. Mo. Pac. R. Co., supra, at 863). A fortiori such knowledge cannot be imputed to this defendant from the playground use of the City's bridge.

None of defendant's witnesses had seen boys climb its property. Posci said that he had reported orally to his superiors many times that little fellows climbed the bridge, and that his custom was to make a written report "in the case of the wires" or "in case of an arrest" (fol. 363); but as no arrest was ever made, he made no written report (fol. 364). It should be noted that there was no evidence of any accident prior to this where boys came in

contact with defendant's wires over this bridge (fol. 374). The City police officer referred to a boy coming in contact with the wires under the bridge (fol. 164). Posci's statement about the wires referred to the custom pursued by him and not to any accident involving the wires over this bridge.

The obvious danger, the extraordinary daring of the children and the reaction upon the mind of one witnessing the same, is illustrated in the testimony of McNally, an employee:

> "Q. In the course of patrolling that yard, have you ever seen any boys on that bridge?
>
> "A. Oh, Lord. They gave me more trouble than the men around the yard.
>
> * * * *
>
> "Q. Have you ever had occasion to chase them off?
>
> "A. Oh, Lord, yes. If I see a little tot up there, I would go up and advise him and tell him of the danger.
>
> "Q. Tell us where you have seen them.
>
> "A. All over the bridge. Sometimes the little fellows would get up there, and I would go and chase them off, and tell them, and explain to them how dangerous it was to get around in there, that they might fall down" (fols. 366, 367).

> "Q. I hand you this defendant's exhibit "D" (handing photograph to witness) and ask you to point out what was the greatest height you had ever seen them up on the bridge.
>
> "A. Oh, Lord. I have seen them get up there, to the top, very near right up there.
>
> "Q. Will you show that to the jury, please?
>
> "A. They would climb right up along here (indicating).

"Q. Have you ever seen them on top of these girders?

"A. No, I never saw them up there.

"Q. Not that high?

"A. No, I never saw them up that high, that I remember.

"The Witness: They might have been up there, but I don't remember" (fol. 367).

See National Metal Co. vs. Agostini (supra, p. 111).

The boys' furtive evasion of the police, of both the City and the railroad, and their quondam profane defiance of the efforts of the latter to eject them (fol. 383) established their lawlessness conclusively, precluded the possibility of defendant's resistance becoming the implied acquiescence of the Stout case and barred the imposition upon the defendant of an affirmative duty.

(3) Plaintiff failed to prove that insulation or other protective devices would not interfere with the wires' functions of propulsion, patrol and lighting in interstate commerce. The tracks under the bridge were a part of the main line into Pennsylvania Station, New York City (fol. 340). The complaint and the bill of particulars alleged negligence through the failure of the defendant to insulate (fols. 67, 71, 83). Obviously, that called for expert opinion. Plaintiff called one expert, but not on insulation. He testified over defendant's objection that the place was unsafe because children could climb to the wire (fols. 196, 197, 199). He had had no practical experience with such propulsion problems (fol. 202). He said that an iron screen attached to the strut, extending out in each direction far enough to prevent approach to the

wires, would constitute reasonably safe maintenance (fols. 205, 206). Defendant was not allowed to ask him whether that protective device had ever been adopted in practice (fols. 204, 205, 207), but its experts said it was impracticable and unknown in practice (fols. 406, 407, 423). Screens were used to protect wires underneath bridges (fol. 419), but obviously that would not interfere with the approach from underneath for repair and maintenance. That the instant construction was standard (fols. 405, 406, 422) was uncontradicted.

Speaking of a protective device, this Court said in the Stout case, referring to the accident: "This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant." That was a simple device. Here is involved the conduction of a dangerous power at a great height above the tracks for use in carrying on commerce where speed as well as safety is a modern essential. There are two thousand struts on defendant's lines (fol. 417) and seventy-eight bridges between New Haven and New York (fol. 335). The protection of the wires, on all or any of them, against infant trespassers, should not be left to juries, especially without any evidence as to the effect upon their function (So. Pac. Co. vs. Berkshire, 254 U. S. 415, 417).

POINT II.

THE NEW YORK RULE OF NON-LIABILITY TO INFANT TRESPASSERS OR LICENSEES FOR INJURIES RECEIVED FROM INHERENT DANGERS IN PRIVATE PREMISES IS SO THOROUGHLY ESTABLISHED THAT IT HAS BECOME A FIXED RULE OF PROPERTY AND ACTION BY WHICH THE COURTS BELOW WERE BOUND IN COMITY. NATIONAL INTERESTS REQUIRE THE AFFIRMATION OF THE PRINCIPLE DECLARED BY THE THIRD CIRCUIT COURT OF APPEALS.

The strut in question was a fixture carrying the defendant's propulsion and other wires over and along its right of way and across and above the highway. It was as much a part of the railroad premises as the roadbed, tracks and turntables. It was fixed and apparently as permanent as a turntable. The fact that its foundation was the superstructure of the City highway bridge, rather than the earth, the fee of which might or might not have been vested in the defendant, is immaterial. Neither the Stout case nor Walsh vs. Fitchburg R. R., 145 N. Y. 301, emphasizes the classification of the proprietary interest. There is no analogy between the strut and an unenclosed sewer in the process of construction in a city street (Johnson vs. City of N. Y., 208 N. Y. 77), a vehicle left in a public highway (Lynch vs. Nurdin, supra), nor even an electric light pole on the highway (Robertson vs. Rockland Co., 187 N. Y. App. Div. 720). This strut was removed from the highway from which there was no immediate access as in the Robertson case. It was a part of the railroad line beneath.

The question, therefore, whether there was any affirmative duty, does not concern mere conduct, nor even conduct and property, mobile or transitory. While the question of the proprietor's obligation in respect to *fixed* property and action is naturally a matter of general law, its potentiality is local. "In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to state laws strictly of local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals and *to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character.*" (Swift vs. Tyson, 41 U. S. 16 Pet. 1, at p. 18. *The italics are ours*). Snare & Triest vs Friedman (supra, pp. 11, 12) holds that the question of the defendant's liability to an infant child injured while playing on some steel beams piled on the sidewalk in an alleged insecure manner would have been determined by the local rule had there been one. Please see Burgess vs. Seligman, 107 U. S. 20; Bucher vs. Cheshire R. R. Co., 125 U. S. 555; Etheridge vs. Sperry, 139 U. S. 267.

The courts below failed to recognize this principle. The circuit court below relied in part on B. & O. R. R. vs. Baugh, 149 U. S. 368. We submit that that case was not in point for "The single question presented for our determination is, whether the engineer and fireman of this locomotive, running alone and without any train attached, were fellow servants of the company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former" (p. 370).

The New York turntable case, holding that there was no liability to an infant *licensee* for injuries received from the dangerous condition of the premises, was decided in 1895 (Walsh vs. Fitchburg R. R., supra). It has been cited with approval repeatedly. (Birch vs. City of New York, 190 N. Y. 397, at p. 404; Johnson vs. City of New York, 208 N. Y. 77, at p. 83; Vaughn vs. T. D. Co., 222 N. Y. 79, at p. 83; Barrett vs. B. H. R. R., 188 App. Div. 109, 111, 112; Lande vs. L. & S. Cons. Co., 191 App. Div. 497, 499; Carroll vs. City of Yonkers, 184 N. Y. Supp. 847, at 851). It has been followed in Holmes vs. D. & H. R. R., 128 App. Div. 24, at 26; Kane vs. Erie R. R., 110 App. Div. 7, at 8; Coleman vs. Graves Co., 97 App. Div. 411. The result, in Freeman vs. B. H. R. R., 54 App. Div. 596, is not inconsistent. As the majority of the states have followed the Stout case, the New York rule is a local one, recognized as such not only by the courts of other states, but by many commentators.

We submit there should not be two conflicting rules of property and action in the second circuit—one of liability declared by the federal court, and the other of non-liability declared by the state courts of both New York and Connecticut (Fitzmaurice vs. The Conn. Rwy. Co., 78 Conn. 406; Wilmot vs. McPadden, 79 Conn. 367; Pastorello vs. Stone, 89 Conn. 286), and that in comity the former should bow to the latter.

POINT III.

IF THE DEFENDANT OWED THE INFANT ANY DUTY THERE WAS NO EVIDENCE OF NEGLIGENCE AS APPEARS FROM THE PREVIOUS DISCUSSION OF THE TESTIMONY.

CONCLUSION.

The complaint should have been dismissed or the verdict directed for the defendant.

Respectfully submitted,

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